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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-943

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 83-1030

RYDER TRUCK LINES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 83-1119

NATIONAL ASSOCIATION OF REGULATORY
UTILITY COMMISSIONERS,
Petitioners,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the Eleventh Circuit affirming the Commission's policy statement in MC-122 (Sub-No. 2) is inconsistent with the Motor Carrier Act, 49 U.S.C. §§10101, *et seq.*?

2. Whether the decision of the Eleventh Circuit conflicts with the decision of this Court in *United States v. Drum*, 368 U.S. 370 (1962)?

3. Whether the decision of the Eleventh Circuit conflicts with the decision of the Fifth Circuit in *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266 (5th Cir. 1983)?

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Intervenor-respondent The National Industrial Transportation League (League)[1] respectfully submits this Brief in Opposi-

[1]Pleadings on behalf of the League in the proceedings below were submitted under the name of The National Industrial Traffic League. In November, 1982, the organization changed its name to The National Industrial Transportation League.

tion to the Petitions for Writ of Certiorari filed by Petitioners American Trucking Associations, Inc. *et al.*, (ATA), Ryder/PIE Nationwide, Inc. (Ryder), and the National Association of Regulatory Utility Commissioners (NARUC) in the above-named cases. Because the issues and arguments presented in these Petitions are subtantially similar, the League has consolidated its responses to the three Petitions in this Opposition Brief.

The National Industrial Transportation League is a voluntary organization of shippers, groups and associations of shippers, and other representatives of industrial and commercial enterprises located throughout the United States. It was a participant in the proceedings before the Interstate Commerce Commission (Commission) and an intervenor-respondent in support of the decision of the Commission before the United States Court of Appeals for the Eleventh Circuit. The League accepts the citations to the opinion below, statements of jurisdiction, and citations to the relevant statutory provisions offered by the petitioners. The League's Statement of the Case and its Reasons for denying the Petitions for Writ of Certiorari are set forth below.

STATEMENT OF THE CASE

After notice and comment, the Interstate Commerce Commission (Commission) on February 17, 1982 served its policy statement in Ex Parte No. MC-122 (Sub-No. 2), *Lease of Equipment and Drivers to Private Carriers,* 132 M.C.C. 756 (1982); ATA Appendix A.[2] The Commission's decision set forth a set of guidelines which modified the existing Commission policy with regard to single-source leasing.[3]

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[2]All appendix references are to the appendices included in the Petition for Writ of Certiorari of American Trucking Associations, Inc., *et al.*, No.83-943.

[3]Under a single-source leasing arrangement, a lessee obtains both vehicle and driver from a single lessor source.

Previously, the Commission employed the so-called "control and substance" test in order to distinguish private carriers from for-hire carriers in single-source leasing contexts. In *H.B. Church Truck Service Company, Common Carrier Application,* 27 M.C.C. 191 (1940), the Commission stated that a rebuttable presumption of for-hire carriage would attach to a single-source leasing arrangement, a presumption that would yield to evidence that the shipper exercised exclusive direction and control over the transportation service. *Oklahoma Furniture Manufacturing Company - Investigation, Operations,* 79 M.C.C. 403, 409-10 (1959), supplemented *Church's* presumptive "control" test with a fact-based inquiry into whether the financial arrangements between the shipper-lessee and the lessor "in substance" constituted for-hire carriage. In *United States v. Drum,* 368 U.S. 370 (1962), the Supreme Court affirmed that the two-pronged "control and substance" test of *Oklahoma Furniture* was a reasonable exercise of the Commission's authority.

The MC-122 (Sub-No. 2) decision eliminated the "control presumption" of *Church* and *Oklahoma Furniture* and promulgated a list of factors which the Commission proposed to rely upon in distinguishing private from for-hire carriage in single-source leasing. The Commission emphasized that these criteria were non-exhaustive and would be applied in the course of rigorous investigations into the actual conduct of operations under single-source leases. 132 M.C.C. at 776; ATA Appendix A at 31a.

Petitions for review of the MC-122 (Sub-No. 2) decision were filed in the Eleventh Circuit in No. 82-5247, *Ryder Truck Lines, Inc. v. United States and ICC,* and No. 82-8133, *Bowman Transportation, Inc. v. United States and ICC,* which were then consoldiated for review. By order filed March 25, 1982, the Eleventh Circuit granted a stay *pendente lite* of the Commission's decision. On October 11, 1983 the Court of Appeals issued its decision in the consolidated cases, holding that the Commission's policy statement was within its statutory au-

thority and had a rational basis. *Ryder Truck Lines, Inc. v. United States,* 716 F.2d 1369 (11th Cir. 1983); ATA Appendix B at 59a.

On November 17, 1983 the Eleventh Circuit stayed the issuance of its mandate pending the filing of a petition for writ of certiorari until December 5, 1983, the stay to continue in effect until final disposition by this Court. A further stay of the issuance of the mandate until December 7, 1983 was granted on December 1, 1983. Petitioner American Trucking Associations, Inc., *et al.* filed on December 7, 1983 a Petition for Writ of Certiorari, Case No. 83-943; this was followed by additional, separate petitions filed on behalf of Ryder Truck Lines, Inc., Case No. 83-1030, and the National Association of Regulatory Utility Commissioners, Case No. 83-1119. The Court of Appeals on January 27, 1984 denied the motion of the Interstate Commerce Commission to vacate the stay of the mandate.

REASONS FOR DENYING THE WRIT

The petitioners argue that the decision of the Eleventh Circuit is inconsistent with the provisions of the Motor Carrier Act, 49 U.S.C. §§10101, *et seq.* (MCA) (ATA Petition at 5-13; Ryder Petition at 15-18); that the decision is contrary to this Court's decision in *United States v. Drum,* 368 U.S. 370 (1962) (ATA Petition at 13-17; Ryder Petition at 8-12; NARUC Petition at 13-17); and that the Eleventh Circuit's holding conflicts with the Fifth Circuit's decision in *Central Forwarding, Inc. v. ICC,* 698 F.2d 1266 (5th Cir. 1983) (ATA Petition at 10-13; Ryder Petition at 14-15).

The petitioners' arguments are incorrect. The decision of the Eleventh Circuit is fully in accord with the statutory framework of the Motor Carrier Act, and is not inconsistent with this Court's precedent or the decisions of other courts of appeals.

A. The Decision of The Eleventh Circuit Affirming the Commission's Decision is Consistent With the Provisions of the Motor Carrier Act

The petitioners assert that the Eleventh Circuit's decision defeats the provisions and purposes of the Motor Carrier Act by undermining the distinctions between private and for-hire motor carriage. They argue that because Congress did not amend in 1980 the existing statutory definitions of "motor carrier," "motor common carrier," "motor contract carrier," and "motor private carrier,"[4] and did not explicitly overrule the Commission's for-hire presumption, the Commission is thus locked into the single-source leasing policy it set forth in *Church* and *Oklahoma Furniture* (ATA Petition at 8-9; Ryder Petition at 16-18).

This contention is flawed on several counts. First, as the Court of Appeals noted in its decision, there is no evidence of Congressional comment regarding the Commission's single-source leasing policy in the legislative record of the Motor Carrier Act of 1980, nor any indication that Congress considered and rejected proposals to abolish the for-hire presumption. 716 F.2d at 1378, 1385 n. 20: ATA Appendix B at 75a, 88a. Indeed, the Court's decision pointed to language in the Senate Report accompanying the 1980 Act that expressly identified the Commission as the appropriate forum for addressing issues not dealt with by Congress. 716 F.2d at 1385 n. 20; ATA Appendix B at 88a. In addition, the Eleventh Circuit properly looked to Congress' overall diminished concern with protectionism and its enhanced reliance on competition, as embodied in the Motor Carrier Act of 1980. 716 F.2d at 1386; ATA Appendix B at 90a.

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[4]The Motor Carrier Act of 1980, P.L. No.96-296, 94 Stat. 793 (1980) did make certain changes in the definition of "motor contract carrier" contained in 40 U.S.C. §10102(12) which permitted a contract carrier to serve a larger number of shippers and operate simultaneously as a contract and common carrier. P.L. No. 96-296, §10, 94 Stat. 793, 799 (1980).

These circumstances alone justify the lower Court's determination that the Commission's decision is consistent with the statutory scheme.

The petitioners' arguments would also deny the Commission its prerogative and its duty, clearly established by the decisions of this Court, to re-examine and modify its policies in response to changing circumstances.[5] The Court of Appeals adhered to long-settled judicial precedent in refusing to impute to Congress' 1980 re-enactment of the MCA's original statutory definitions a legislative mandate for administrative inflexibility.

The petitioners also contend that the Eleventh Circuit's affirmance of the Commission's decision "undermines the essence of the system of economic regulation of for-hire carriage contemplated by Congress" by sanctioning "unregulated and secretive leasing arrangements" (ATA Petition at 5-6). This, however, is mere speculation on the part of the petitioners which merits no weight in an assessment of the validity of the Commission's decision or a review of the soundness of the lower Court's judgment. As the Court noted, the Commission emphasized that it plans to preserve the distinction between private and for-hire carriage. 716 F.2d at 1386; ATA Appendix B at 91a. Indeed, the Commission's revised policy, which calls for a detailed, multifactor examination of transportation circumstances, should be viewed not as a vehicle for destroying the concept of regulated carriage, but as a means to provide more refined and accurate determinations in individual leasing contexts.

To the extent that the petitioners contend that the Commission will apply its new guidelines in a manner that will destroy the statutory distinction between private and for-hire carriage, this issue is not ripe for judicial review by this Court. The policy

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[5] *See, e.g., American Trucking Associations v. Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967); *Massey Motors, Inc. v. United States*, 364 U.S. 92 (1960).

statement provides a set of flexible principles to guide future agency decisionmaking; the exact parameters of the revised policy will emerge only over the course of individual enforcement proceedings. For this reason,

> " . . . judicial appraisal of these factors is likely to stand on much surer footing in the context of specific application of this regulation than could be the case in the framework of the generalized challenge made here."

Toilet Goods Association, Inc. v. Gardner, 387 U.S. 158, 164 (1967).

B. The Decision of The Eleventh Circuit Is Consistent With This Court's Decision in United States v. Drum

The petitioners err in asserting that the Court of Appeal's decision conflicts with this Court's decision in *United States v. Drum*, 368 U.S. 370 (1962). Although *Drum* did affirm the Commission's decision in *Oklahoma Furniture*, which employed the "control" presumption of for-hire carriage, at no point does the Supreme Court's opinion indicate that the *Oklahoma Furniture* criteria were the *only* ones consistent with statutory definitions. *Drum* held that the Commission's decision "*does not seem to us to violate* the coherence of the body of administrative and judicial precedents," 368 U.S. at 376 (emphasis added), and "*betokens no heedless departure* from the beaten track of administrative decision . . ." *Id.* at 384 (emphasis added). This is language meant simply to affirm, not enshrine as a matter of law, the presumptive "control and substance" test.

According to the *Drum* court, the Motor Carrier Act required a finding of for-hire carriage in a single-source leasing situation where the shipper did not "assume the characteristic burdens of the transportation business." *Id.* at 375. The decision noted that the Commission had chosen to employ "a developing technique of analysis" in defining the characteristic burdens, thus acknowledging agency discretion in policymaking. *Id.* at 410.

The petitioners appear to have overlooked the facts that *Church* itself represented a departure from prior agency policy, and that *Oklahoma Furniture* in turn modified the *Church* criteria by supplementing the "control" test with the "substance" test. Therefore, the Court of Appeals was justified in concluding that the rejection of the for-hire presumption "is indicative only of the Commission's new views as to which burdens constitute significant indicia of private transportation." 716 F.2d at 1380; ATA Appendix B at 78a. The precedent of *Drum* cannot be invoked to obstruct the evolutionary course of policy development.

C. The Decision of The Eleventh Circuit Does Not Conflict With the Decision of The Fifth Circuit in Central Forwarding, Inc. v. ICC

According to the petitioners, both the Commission and the Court of Appeals have attempted to use the National Transportation Policy (NTP) as an independent source of authority for the revised single-source leasing policy. Such reliance on the NTP, they argue, was denied by the Fifth Circuit in *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266 (5th Cir. 1983). However, this case and *Central Fowarding* are readily distinguishable. At issue in *Central Forwarding* was the Commission's authority to issue rules concerning the level of compensation paid by regulated carriers to unregulated owner-operators; the Fifth Circuit held that the NTP *alone* could not authorize such a regulation in the absence of another, substantive empowering provision of the Interstate Commerce Act. By contrast, the Commission unquestionably has the authority to make decisions defining the boundary between private and for-hire carriage in the leasing context. *Drum* expressly affirms this authority.[6] Thus, the Commission also has the authority to issue policy statements which outline the considerations that will

[6] ". . . The Commission, therefore, has had to decide whether a particular arrangement gives rise to that 'for-hire' carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage. . ." 368 U.S. at 374.

guide the agency's decisionmaking in future enforcement proceedings.

The Commission identified the NTP as one basis for the reasonableness of the particular policy choice adopted pursuant to agency authority to enforce the Motor Carrier Act. As the Court of Appeals noted, there were additional reasonable justifications for the Commission's policy change, perhaps most important the reduced need for protectionist regulation in the face of a changing transportation environment. In this regard, the Eleventh Circuit's decision is in accord with the Fifth Circuit's decision in *Mercury Motor Express, Inc. v. United States*, 648 F.2d 315 (5th Cir. 1981), which upheld a Commission change in policy direction based upon "[t]he dramatic changes which have taken place within the area of its ongoing regulation [that] have persuaded the Commission that its former protectionist attitude toward the financial stability of the regulated carriers is no longer consistent with the national interest." 648 F.2d at 319.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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